United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1212

To be argued by
CAROL B. AMON

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1212

UNITED STATES OF AMERICA,
Appellee,

—against—

ARMANDO ESPARZA, DELFIN "LEO" GONZALEZ
and HECTOR CHRISTIAN,
Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF AND APPENDIX FOR THE APPELLEE

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

ALVIN A. SCHALL,
CAROL B. AMON,
Assistant United States Attorneys,
(Of Counsel).

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Preliminary Statement

Armando Esparza, Delfin Leo Gonzalez and Hector Christian appeal from judgments of conviction of the United States District Court for the Eastern District of New York (Mishler, *C.J.*). Appellants were all convicted after a jury trial of conspiracy to distribute cocaine, in violation of Title 21, United States Code, Section 846. Appellants Esparza and Gonzalez were also convicted of two additional counts, possession with intent to distribute cocaine (Count Two) and distribution of cocaine (Count Three), both in violation of Title 21, United States Code, Setcion 841(a)(1) and Title 18, United States Code, Sec tion 2. On May 21, 1976, appellant Esparza was sentenced to a ten year term of imprisonment and a five year special parole term. On May 14, 1976, appellant

Gonzalez was sentenced to a twelve year prison term and a three year special parole term. Appellant Christian received a two year term of imprisonment and a five year special parole term on May 7, 1976.[1]

On appeal, appellant Esparza raises two issues. First, he alleges the trial court erred in admitting as a prior similar act, testimony concerning a heroin sale in 1969. Secondly he contends the prosecutor's comments during summation concerning this prior similar act were improper and constituted reversible error.

Appellant Christian raises two issues on appeal. First, he contends that although the indictment charged only a single conspiracy, the proof at trial established two independent conspiracies. Secondly, Christian alleges he withdrew from the conspiracy on May 16, 1976.

The sole argument advanced by appellant Gonzalez on appeal is that his convictions on Count Two and Count Three merged, and that accordingly he should be resentenced.

Statement of the Case

A. The Government's Case

The Government's witnesses at trial were Luis Rodriguez, who during the course of the conspiracy charged was at first a co-conspirator of appellants and later after his arrest a government informant, and Drug Enforcement Administration ("DEA") Agents Nicholas Alleva, Alfred Cavuto, Paul Sennett, and Vincent Guadagnino. The following facts were established through the testimony of these witnesses.

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[1] A first trial of appellants was begun on January 19, 1976, and ended in a mistrial on January 27, 1976 when the jury was unable to reach a verdict.

On April 21, 1975, Luis Rodriguez, then unaware that Nicholas Alleva was an undercover agent of the DEA, introduced Alleva to Hector Christian in the Roaring Twenties Bar in Brooklyn, New York, for the purposes of arranging a narcotics transaction (T. 34, 90, 212-214, 328, 330).[2] Christian told Alleva on that occasion that he could supply him with cocaine. Alleva stated that he would be interested initially in one-eighth of a kilogram of cocaine, and more in the future if the quality of the eighth was satisfactory (T. 38, 214).

On May 15, 1975, Rodriguez spoke with Christian on the phone and the two met that evening at the Tinitas Bar in Brooklyn, New York. Christian explained to Rodriguez that he would have cocaine available the following day (T. 38-39). Rodriguez then spoke with Alleva who told him to make arrangements for the purchase. Christian called Rodriguez on May 16, 1975 and arranged with him for the transaction to take place between 9:30 and 10:00 o'clock that evening at the Tollgate Bar on the corner of 8th Avenue and 39th Street in Brooklyn (T. 34-40, 169-170, 216-217).

That evening, Rodriguez went to the Tollgate bar and met with Agent Alleva and Agent Alfred Cavuto. Cavuto was also working in an undercover capacity, posing as Alleva's nephew (T. 36, 217, 376). While the trio was waiting at the bar for Christian and his associates to appear, Christian called Rodriguez from the Tinitas bar and assured him that he and his people would be there (T. 42-43, 110, 218, 374-375).

Some time later when no one had appeared, Rodriguez and the two agents went to the Tinitas bar and met Chris-

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[2] References with the prefix "T" are to pages of the trial transcript.

tian there. After a short time, appellant Gonzalez arrived at the bar. He was introduced by Christian as one of the persons who was to deliver the cocaine and as the partner of the source. Gonzalez told Rodriguez that the party to the transaction who had possession of the cocaine was following in another car and would be there shortly. When this other party failed to appear, however, the two agents and Gonzalez and Rodriguez left the Tinitas bar. Outside of the bar, Gonzalez gave Agent Alleva his telephone number, and Rodriguez gave Gonzalez his business card (T. 43-45, 218-22, 270-271, 310-311, 377-380).

The next day, May 17, 1975, Gonzalez called Rodriguez at his place of employment, Nemet Ford in Jamaica, New York, and told him that he was going to bring over the "source" the "guy with the cocaine" (T. 47, 48, 60, 94, 110-111). That afternoon, Gonzalez came to Nemet Ford with appellant Armando Esparza. Esparza explained to Rodriguez that he was expecting a large shipment of cocaine in the future and gave Rodriguez the phone number at a social club where he could be contacted (T. 46-48, 199, 125, 129, 209). Esparza also told Rodriguez not to blame Gonzalez and Christian for the package of cocaine not being delivered the night before. Esparza explained that the individuals with the cocaine had arrived at the bar after Rodriguez and the undercover agents had left (T. 48).

On May 22, 1975, Rodriguez was arrested for arranging the sale of one pound of cocaine from another narcotics dealer to Agent Alleva. Subsequent to his arrest, Rodriguez agreed to cooperate with the DEA Agents on their investigation in the Esparza case (T. 26-32, 63-65, 115-116, 142-147, 201-202, 226, 260-262, 272-273).

On May 27, 1975 (after Rodriguez had begun to cooperate with the Government), Gonzalez called Rodriguez on the telephone and put Esparza on the line.

Esparza informed Rodriguez that he had good quality cocaine available and was prepared to make a sale; he told Rodriguez to work out the details of the transaction through Gonzalez (T. 52-53, 226-227). After checking with Alleva, Rodriguez spoke with Gonzalez and they agreed upon the Tollgate Bar on May 29, 1975, between 9:30 and 10:00 o'clock in the evening as the time and place for the narcotics sale (T. 53, 132, 169-173).

On May 29, Rodriguez arrived at the Tollgate Bar at approximately 9:20 p.m. Shortly thereafter, Gonzalez drove up in a 1968 red Pontiac which he parked beside the building where the bar was located. Gonzalez greeted Rodriguez and explained to him that he was going down the block to pick up the package of cocaine and would be back. Rodriguez observed Gonzalez leave the bar on foot (T. 54, 134, 137, 174-175, 232). Agents Alleva and Cavuto arrived at approximately 9:30 p.m. shortly after Gonzalez left.

Approximately fifteen minutes later, Agent Paul Sennett observed Esparza in a 1969 Cadallac drop Gonzalez off in front of the Tollgate Bar. Thereafter, Sennett saw Esparza driving slowly around the block in the area of the bar, looking around constantly and finally parking on 8th Avenue about a block away from the bar (T. 428-432).

When Gonzalez entered the bar, he met with Alleva, Cavuto and Rodriguez. He and Cavuto then went to Gonzalez' car parked on the side of the bar to test the cocaine. Gonzalez sat in the front seat and Cavuto in the back. Gonzalez reached under the dashboard of the car, removed a package wrapped in a paper towel unwrapped it and handed it to Agent Cavuto. Cavuto using a chemical reagent tested the white powder with positive results for cocaine. Gonzalez assured Cavuto

that the cocaine was from 90% to 100% pure and it weighed 122 grams (T. 54-56, 138, 233, 289-291, 382-387, 417-419).

After the testing was completed, Gonzalez and Agent Cavuto returned to the Tollgate. Shortly thereafter, Cavuto, Alleva and Gonzalez left the bar. Alleva and Cavuto crossed the street to the Government car, parked on 8th Avenue and removed $5,000 in government funds from the car. They then walked back across the street in front of Esparza's car and met with Gonzalez. Alleva accompanied Gonzalez around the corner of 8th Avenue where Gonzalez handed Alleva the package of cocaine in return for the $5,000.[3] Gonzalez promised Agent Alleva that he would be able to get him a kilogram or a half kilogram of cocaine the following week (T. 233-235, 296-302, 324, 358, 386-387, 404-405, 419). After receiving the money, Gonzalez was then observed by Agent Sennett to enter Esparza's car and ride off with Esparza (T. 434-435, 460-464).

Appellants Esparza and Christian were arrested on October 21, 1975. At that time, agents found Luis Rodriguez' business card among the personal papers Esparza was carrying (T. 241-242). Christian was carrying an address book which contained the name "Mexico" and the same phone number Esparza had given Rodriguez (T. 244).

The Government also offered testimony of a prior similar act of appellant Esparza. Vincent Guadagnino testified that on July 8, 1969, while working as an undercover agent with the Bureau of Narcotics and Dangerous Drugs, he purchased 25 grams of heroin from appel-

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[3] The Government and the defendants entered into a stipulation that the package contained cocaine (T. 239).

lant Esparza (T. 475-478, 483). He further testified that at that time Esparza had used the nick name "Mexico".

In addition, evidence was introduced of a subsequent similar act involving appellant Christian. Agent Alleva testified that on September 5, 1975, he and Luis Rodriguez met again with the appellant Christian at the Tinitas Bar in Brooklyn to receive from Christian an eighth of a kilogram of cocaine. Christian's source for the narcotics failed to appear, however, and the transaction was never consummated (T. 361-365).

B. Defense Case

(1) Appellant Esparza.

Stephen Felsen testified that he was an undercover officer for the New York City Police Department who worked on narcotics cases, and that in November of 1974, he first met Luis Rodriguez. He stated that at a meeting later that month with Rodriguez, Felsen was wearing a recording device and taped a conversation which he had with Rodriguez concerning a potential narcotics transaction (T. 492-495).

Luis Rodriguez who had already testified previously that he had attempted in the past to arrange narcotics transactions, was called as a witness by Esparza. Rodriguez stated that in November 1974, he told Felsen that he wanted to go to Miami to attempt to purchase two kilos of cocaine for him. The barely audible tape of their conversation was played, and Rodriguez explained what was being discussed in the tapes. No transaction resulted from these negotiations (T. 62, 503-522).

(2) Appellant Gonzalez

Appellant Delfin Leo Gonzalez testified that he and Rodriguez, the government informant, had in the past frequented the San Rafael Social Club in Brooklyn (T. 516, 576-577). He admitted he was in the Tollgate bar with Rodriguez on May 29, 1975, the day of the narcotics sale (T. 537). However, Gonzalez claimed that he was there merely in the capacity of a delivery boy, to deliver a package to Rodriguez' friends. Gonzalez stated that at a chance meeting on the previous day in the El Torero bar in Brooklyn, Rodriguez had offered him $200 to make the delivery (T. 537-538, 561). Gonzalez did not ask what the package contained, nor did he inquire who Rodriguez' friends were (T. 541, 562-563).

According to Gonzalez, when he arrived at the Tollgate bar on May 29, 1975, Rodriguez gave him the package containing the narcotics and told him to put the package in his (Gonzalez') car and to leave it there until the other parties to the transaction arrived (T. 538-539, 563).

Gonzalez admitted that he later went to the car with Agent Cavuto and handed him the package (T. 542, 571). However, he denied opening the package before giving it to Cavuto and also denied telling him it was 90-100% pure and that it weighed 122 grams (T. 543, 571).

According to Gonzalez, after he and Cavuto got out of the car, he went around the corner of 40th Street and 8th Avenue and handed Alleva the package (T. 543). He denied telling Alleva he could get him a kilo or half kilo of cocaine the next week (T. 543, 572).

Gonzalez stated that he met Rodriguez at the El Torero bar after he received the money from Alleva according to prior arrangement (T. 543-544) and received from Rodriguez the $200 fee for delivering the package to Alleva (T. 545-546, 549).

Gonzalez denied that he had left the Tollgate with Esparza, as Agent Sennett had testified (T. 546-547, 573). He also denied having any conversation with Luis Rodriguez, concerning Gonzalez supplying cocaine in May 1975, and denied entering into any conspiracy or agreement to supply cocaine in May 1975 (T. 552).

In further contradiction of the testimony of both Alleva and Rodriguez, Gonzalez stated that May 29, 1975 was the first time he had ever met Alleva, and that he was not present in the Tinitas bar on May 16, 1975 (T. 43-45, 572).

ARGUMENT

POINT I

The trial court properly admitted evidence of a prior narcotics sale by appellant Esparza.

In the Government's direct case, Special Agent Vincent Guadagnino testified that on July 8, 1969, while acting in an undercover capacity, he purchased 25 grams of heroin from Appellant Esparza while the two were sitting in a car on Butler Street in Brooklyn (T. 477-478). The court, in finding such testimony admissible, noted that: ". . . in light of the examination and the apparent claim and argument that was made or could be made that even if he was in the area, all he did was

drove Mr. Gonzalez there and drove him away without knowing it was a drug transaction, is a prior similar act in point." (T. 474). Appellant argues that the trial court abused its discretion in allowing this testimony into evidence because its probative value was allegedly outweighed by its "prejudicial effect" upon the jury.

The Second Circuit rule with regard to the admissibility of other crimes evidence is an inclusory one; that is, such evidence is admissible if it is offered for any purpose other than to merely show the criminal character of the defendant. *United States* v. *Deaton*, 381 F.2d 114, 117 (2d Cir. 1967); *United States* v. *Papadakis*, 510 F.2d 286, 294 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975); *United States* v. *Johnson*, 525 F.2d 999, 1006 (2d Cir. 1975). *See also*, Federal Rules of Evidence, Rule 404(b).

In addition, it is well settled that the Government need not wait to see which element of its proof will be attacked by the defense before introducing evidence of a similar crime which is probative of that element. *United States* v. *Johnson*, 382 F.2d 280, 281 (2d Cir. 1967). Thus, evidence of a prior similar act is admissible if the element of the crime of which the act is probative is placed in issue either by the nature of the facts sought to be proved by the prosecution or the nature of the facts sought to be established by the defense. *United States* v. *Smith*, 283 F.2d 760, 763 (2d Cir. 1960), *cert. denied*, 365 U.S. 851 (1961); *United States* v. *Freedman*, 445 F.2d 1220, 1224 (2d Cir. 1971).

As Judge Mishler noted, the testimony of Guadagnino was highly relevant on the question of Esparza's knowledge and intent on May 29, 1975. See, *United States* v. *Leonard*, 524 F.2d 1076, 1091 (2d Cir. 1975); *United States* v. *Drummond*, 511 F.2d 1049, 1055 (2d Cir.), *cert denied*, 423 U.S. 844 (1975). Thus, such evidence

was important proof that Esparza knew about and was a party to the drug transaction taking place and not simply a nice person who had chauffered a friend to and from a bar. Although appellant concedes that "intent was placed in issue by the nature of the proof required to be established by the prosecution" (Appellant's brief at p. 9), he argues that intent was not placed in issue by the defense and thus the evidence of the similar crime was necessary and prejudicial. Esparza's argument is without merit.

Knowledge and intent were elements of the crime. The Government was entitled to present similar act evidence of these elements without waiting to see if appellant would contest them. *United States* v. *Johnson*, *supra*. Moreover, in this case, it was entirely reasonable for the Government to expect that knowledge and intent would be placed in issue by the defense. In the first trial, Esparza placed his intent clearly and unequivocably in issue through the testimony of Lawrence Wallace. (Government's Appendix, pp. 1a-7a). Wallace testified that on the evening of May 29, 1975 Gonzalez came to the San Raphael Social Club where Esparza worked and told Esparza that he was having car trouble and asked him to give him a lift. The obvious purpose for Wallace's testimony was to establish that Esparza was innocently at the scene of the transaction. Thus, Esparza having directly focused on the issue of his intent and knowledge in the first trial, the Government was clearly justified in anticipating that he would do the same in the second trial. The fact that a tactical decision, Esparza ultimately chose not to call Wallace as a witness in the second trial is not controlling.[4] The

[4] Wallace's testimony at the first trial was in direct conflict with the testimony of Gonzalez. Gonzalez testified that Esparza did not drive him to and from the bar on the evening of the transaction.

Government was nonetheless required to prove that Esparza was not simply at the wrong place at the wrong time.

In *United States* v. *Brettholz*, 485 F.2d 483 (2d Cir. 1973), *cert. denied*, 415 U.S. 976 (1974), this Court, at page 487, quoted McCormick, Evidence § 190 at 453 (2d Ed. 1972), in summarizing the factors to be considered in determining the admissibility of similar acts evidence:

> the problem is not merely one of pigeonholding, but one of balancing, on the one side, the actual need for the other—crimes evidence in the light of the issues and the other evidence available to the prosecution, the convincingness of the evidence that the other crimes were committed and that the accused was the actor, and the strength or weakness of the other crimes evidence in supporting the issue, and on the other, the degree to which the jury will probably be roused by the evidence to overmastering hostility.

Appellant Esparza does not contest the fact of the 1969 heroin sale. Rather, he challenges the Government's need for the evidence and contends that Agent Guadagnino's testimony was "of relatively weak nature" (Appellant Esparza's brief at p. 12) in proving knowledge and intent. We respectfully submit that appellant is wrong on both points.

In arguing that the fact of the heroin sale was weak evidence in establishing intent for the cocaine transaction, appellant noted that the drugs sold were different and that there was a seven year time gap between the sales. The fact that the two drugs were different is unimportant. What is similar and what is important is that they were both illegal high priced narcotics. Moreover, the first

transaction, like the second, was conducted in the streets. The fact that the event occurred approximately six years before the conspiracy did not render it inadmissible. In *United States* v. *Gerry*, 515 F.2d 130, 141 (2d Cir. 1975), the co-defendants were charged with influencing the outcome of harness races by bribery. The trial court admitted evidence that approximately seven years before the time of the conspiracy, the co-defendants had fixed other races. The date of the prior similar act is just one factor to be considered by the trial judge and Gudagnino's testimony was not rendered too remote or prejudicial by the mere lapse of time. Finally, the Government's need for the evidence is clear. The only direct evidence of Esparza's intent was the testimony of the highly impeachable witness Rodriguez.

In determining the admissibility of a prior similar act, the trial judge must balance all the relevant facts to determine whether the probative value of the evidence outweighs its prejudicial effect. As the court noted in *United States* v. *Leonard*, *supra* at 1092:

> the weighing of the probative value of the evidence against its potentially prejudicial effect is primarily for the trial judge who has a feel for the effect of the introduction of this type of evidence that an appellate court working from a written record simply cannot obtain.

In this instance, Judge Mishler, weighing all the factors and having the added advantage of presiding at the first trial, correctly determined that evidence of Esparza's prior heroin sale was admissible. His decision was not an abuse of discretion. Cf. *United States* v. *Ravich*, 421 F.2d 1196, 1204 (2d Cir.), *cert. denied*, 400 U.S. 834 (1970).

POINT II

The prosecutor's statements during summation concerning the appellant Esparza's prior similar act were entirely proper.

Appellant contends that the prosecutor's statements to the jury during summation (T. 606-607) regarding the evidence of the prior similar act were improper and constituted reversible error. Specifically, Esparza contends that the prosecutor used the prior act in summation to argue that he was a man of criminal character. The claim is without merit. The testimony of Agent Guadagnino regarding the prior similar act of the appellant Esparza was properly admissible to show the intent of Esparza. *United States* v. *Papadakis*, 510 F.2d 287 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975); *United States* v. *Brettholz*, 485 F.2d 483 (2d Cir. 1973), *cert. denied*, 415 U.S. 976 (1974). It was in connection with intent that the prosecutor argued the similar act.[5]

It is the prosecutor's function to make a forceful and vigorous argument based upon the evidence in the record. *United States* v. *Brown*, 456 F.2d 293, 295 (2d Cir.), *cert. denied*, 407 U.S. 910 (1972). This is precisely what the prosecution did, the challenged statements constituting a fair comment on the evidence. The prosecutor's statement did not seek to show Esparza's criminal character, but rather to establish the criminal intent of Esparza. Guadagnino's testimony and the related prosecution comment rebutted a potential claim by Esparza, or a possible jury consideration, that Esparza had innocently driven

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[5] The portion of the prosecutor's summation about which appellant complains is set forth on page 16 of appellant Esparza's brief.

the appellant Gonzalez away from the Tollgate bar on May 29, 1975. The prosecutor's comments were made to show that Esparza was criminally involved in the conspiracy, despite his failure to be personally involved in the physical exchange of the narcotics. It is reasonable to assume that the reason Esparza did not personally deliver the cocaine to Agent Alleva, and instead utilized the middleman Gonzalez, was to prevent a repetition of the events of 1969 when Esparza was arrested and convicted. This is precisely what the prosecution argued in its summation, and consequently, the challenged statement was not an impermissible comment on the appellant's criminal character.

POINT III

Appellant Gonzalez' conviction under Count Two of the indictment did not merge with his conviction under Count Three.

Appellant Gonzalez contends that his convictions under Count Two of the indictment, possession of cocaine with intent to distribute, and Count Three, distribution of cocaine, merged into a single offense. Both of these offenses are violations of 21 U.S.C. § 841(a)(1).

In interpreting § 841(a)(1), it has been held that the two offenses do not merge into a single conviction. *United States* v. *Horsley*, 519 F.2d 1264, 1265-66 (5th Cir. 1975). In *Horsley*, as here, the defendants were convicted on separate counts of possession with intent to distribute a controlled substance, and distribution. In affirming the convictions on the separate counts, the Fifth Circuit panel utilized the "different evidence" test that convictions for separate offenses resulting from a single

fact pattern are upheld if each statutory violation requires proof of different facts and elements. The *Horsley* court followed the reasoning in *United States* v. *Costello*, 483 F.2d 1366, 1368 (5th Cir. 1973), that possession and distribution of narcotics were separate offenses. The decision in *Costello* was based on the fact that possession was complete upon receipt of drugs from a third party, while distribution later required transfer to a third party.

It is clear that under § 841(a)(1) the possession with intent to distribute charge can be proved without proof of actual distribution, and the distribution charge can be proved without proof of possession with intent to distribute, or even possession. *United States* v. *Stevens*, 521 F.2d 334, 337 (6th Cir. 1975). Indeed, in a somewhat different setting, this court has recognized just such a possibility. See, *United States* v. *Cioffi*, 487 F.2d 492 (2d Cir. 1973). *Cioffi*, involved counterfeit postage stamps, but the analogy to narcotics is consistent. The court stated:

> although it would be rare for a seller not to have at least constructive possession, such a case is conceivable, e.g., if A, a middleman sells B counterfeit owned by and in possession of C, and the contraband is delivered directly to B by C. *Id.* at 496.

The crimes of possession with intent to distribute cocaine and distribution of cocaine are totally separate crimes requiring different elements to be proven. Since the proof of one offense does not automatically prove the other, a conviction of both of these offenses should not merge into a single conviction.

The only cases appellant Gonzalez cites for the claim that the crimes charged in Counts Two and Three merge are not dispositive of the issue. In *United States* v.

Curry, 512 F.2d 1299, 1306 (4th Cir. 1975), the court held that where there is *no* evidence of possession with intent to distribute a controlled substance apart from evidence of the actual distribution, the offenses merge. However, this is not the situation in appellant's case. There were statements made by Gonzalez to Drug Enforcement Administration agents and the government informant Rodriguez, indicating that he (Gonzalez) had possession of cocaine and would be willing to sell (T. 46-47, 220-222, 235). This is sufficient evidence in itself for the jury to conclude that the cocaine the appellant possessed was intended for distribution. It is clear that the actual distribution of cocaine by Gonzalez was not the sole evidence presented to the jury on the possession charge.

The other case appellant cites in support of his claim of merger, *United States* v. *Howard*, 507 F.2d 559 (8th Cir. 1974), is inapposite. In *Howard*, the defendant was charged with distribution of heroin in violation of 21 U.S.C. § 841(a)(1). Pursuant to a request by the defense, the trial judge instructed the jury that if it found the defendant guilty of unlawful possession, but with no intent to distribute, it could convict the defendant of the lesser included misdemeanor offense of simple possession (not charged in the indictment). The judge further charged that the jury was not to consider the lesser included offense if it found the defendant guilty on the distribution counts charged in the indictment. Contrary to the court's instructions, however, the jury returned verdicts of guilty on both distribution and simple possession. The defendant was sentenced on both charges and appealed. On appeal, a panel of the Eighth Circuit reversed the simple possession convictions and vacated the sentences on those charges. The court based its decision on the proposition that since "[a] defendant may not be charged and convicted of both a major offense and a lesser in-

cluded offense arising out of the same facts, . . . [a] *fortiori* [he could] not be convicted of both the offense with which he was charged and a lesser included offense with which he was not charged." *United States* v. *Howard*, *supra*, 507 F.2d at 563.

The somewhat unusual facts of *Howard* make it clearly distinguishable from the case at bar. Here appellant *was* charged in separate counts with both distribution and possession with intent to distribute not a lesser included, but rather, a separate and distinct offense. See, *United States* v. *Stevens*, *supra*, 521 F.2d at 337 n.2. Moreover, as demonstrated above, there was ample evidence at trial to indicate that appellant Gonzalez possessed the cocaine well before he distributed it. Hence, it cannot be argued that his distribution and possession convictions necessarily arose "out of the same facts." *Id.*[6]

POINT IV

The proof at trial established that there was a single on-going conspiracy.

Appellant Christian contends that the proof at trial actually showed two conspiracies, not the single conspiracy charged in the indictment. The claim is without merit.

The individuals criminally involved in the conspiracy were Rodriguez, Esparza, Gonzalez and Christian. The

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[6] We further submit that appellant Gonzalez is incorrect in his assertion that the judgment of conviction on the possession count should be vacated. Even assuming *arguendo* that the possession and distribution charges arose "out of the same facts", the proper remedy would be to let the convictions on both counts stand and to impose a single sentence. *United States* v. *Stevens*, *supra*, 521 F.2d at 336-337.

evidence introduced at trial established that the conspiracy began in late April, 1975, and did not terminate until after the sale of cocaine on May 29, 1975. The presumption that a conspiracy continues until the contrary is shown has not been rebutted. *Hyde* v. *United States*, 225 U.S. 347, 370 (1912); *United States* v. *Cirillo*, 468 F.2d 1233, 1239 (2d Cir. 1972), *cert. denied*, 410 U.S. 989 (1973); *United States* v. *Stromberg*, 268 F.2d 256, 263 (2d Cir.), *cert. denied*, 361 U.S. 863 (1959). The original conspiracy did not end on May 16, 1975, when the proposed sale was not consummated at the Tinitas bar. The parties to the conspiracy remained the same, and they merely renewed their efforts to effectuate the narcotics transaction.

Christian was not eliminated from the conspiracy after the aborted sale on May 16, 1975. At the meeting between Rodriguez and Christian on May 17, 1975, Christian expressed the concern that he would be left out of the deal. However, Rodriguez assured him that he was still a member of the group and that he would receive money for his part in the transaction (T. 49-51). Christian was still vitally interested in the final outcome of the cocaine sale, since it is reasonable to assume that if the sale was never made, there would be no funds with which to pay him. Christian had completed his active role in the plan by bringing the prospective buyers and sellers together, but he was still an interested member of the conspiracy.

Thus, there is clearly no basis for appellant's contention that there were two spheres of operation and two conspiracies. The method of operation, the relationship between the participating individuals, and their goals in the conspiracy were consistent throughout and were effectuated pursuant to a common plan and scheme. *United States* v. *Bynum*, 485 F.2d 490, 496 (2d Cir.

1973), *vacated and remanded on other grounds*, 417 U.S. 903 (1974); *United States* v. *Calabro*, 467 F.2d 973, 983 (2d Cir. 1972), *cert. denied*, 462 U.S. 926 (1973).

POINT V

Appellant Christian did not withdraw from the conspiracy on May 16, 1975

It is well-settled that the mere cessation of activity is not sufficient to constitute a withdrawal from a conspiracy. There must also be an affirmative action, either the making of a clean breast to authorities, or a communication of the abandonment to the co-conspirators, and the burden of establishing withdrawal is on the defendant. *Hyde* v. *United States*, 225 U.S. 347, 370 (1912); *United States* v. *Borelli*, 336 F.2d 376, 388 (2d Cir. 1964), *cert. denied*, 379 U.S. 960 (1965). Although, appellant Christian, contends that he abandoned the conspiracy on May 16, 1975; the facts clearly demonstrate that he did not.

When Rodriguez and Christian met at Tinitas' bar on May 17, 1975, the day after the aborted cocaine sale, Christian was concerned that Rodriguez would now deal directly with the source of the cocaine, and that Christian would be left out of the transaction. (T. 49-51). Christian desperately wanted to remain a part of the deal and was upset that he might be left out. Such conduct is hardly consistent with a claim that he withdrew from the conspiracy. Rodriguez relieved Christian's fears by assuring him that he would receive some money for his services. Moreover, Gonzalez assured Rodriguez he would "take care" of Christian. (T. 50).

The fact that Christian was not present at any of the events after May 17, 1975 is of no consequence. Although

Christian had completed his active role in the plan by bringing the prospective buyers and sellers together, he never withdrew from the conspiracy and, therefore, remained a member for its entire duration.

CONCLUSION

The judgments of conviction should be affirmed in all respects.

Respectfully submitted,

Dated: Brooklyn, New York
September 8, 1976

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

ALVIN A. SCHALL,
CAROL B. AMON,
Assistant United States Attorneys,
*(Of Counsel).**

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* The United States Attorney's Office wishes to acknowledge the valuable assistance of William McGuire in the preparation of this brief. Mr. McGuire is a third year student at St. John's University School of Law.

APPENDIX

Excerpts From Testimony

[528] LAWRENCE WALLACE, having been first duly sworn by the Clerk of the Court, took the witness stand and testified as follows:

DIRECT EXAMINATION
BY MR. LAIFER:

Q. Mr. Wallace, how old are you? A. Seventeen.

Q. Where do you reside? A. 4809 Fifth Avenue, Brooklyn.

Q. Who do you reside with? A. My mother.

Q. Are you employed? A. I am a student.

Q. Where are you a student? A. John Jay High School, Brooklyn.

Q. Have you ever been arrested for anything? A. No.

Q. Do you also aside from being a student have employment? A. I was in the high school executive internship program working with Judge Mollen in the Supreme Court, State of New York.

Q. In what capacity? A. As an assistant, go into the Courtroom and observe procedures and things like that. [529] Q. How long have you been working with Judge Mollen? A. Since September 1975.

Q. What is Judge Mollen's function in the state court? A. He is Assistant Administrative Judge of Kings County and Richmond County.

Q. Do you know the defendant in this case, Mr. Esparza? A. Yes, I do.

Q. Tell the jury how you know Mr. Esparza? A. I met him August 30, 1971. He opened a small grocery store and I went to work for him there and have known him since then.

Q. Are you familiar with the San Rafael Social Club? A. Yes I am.

Excerpts from Testimony

Q. How are you familiar with that? A. I am a member of the club.

Q. For how long a period of time have you been a member? A. For about two years.

Q. Do you know Luis Rodriguez? A. Yes I do.

Q. How do you know Luis Rodriguez? [530] A. He is also a member of the club.

Q. How many times have you seen him at the club? A. Many times.

Q. Over what period of time? A. Since about the fall of 1974.

Q. And what would he do when he would come to the club? A. He would come in, play cards and pool with all the guys there.

Q. And do you know what Mr. Rodriguez did for a living? A. He was a car salesman.

Q. On May 29, 1975 were you at the social club? A. Yes I was.

Q. What time did you arrive there? A. Approximately 8:00 o'clock.

Q. Who else was present at that time? A. Mr. Esparza was there at 8:00 o'clock.

Q. What happened thereafter. A. About 8:30 Mr. Gonzalez came into the social club and they talked. Mr. Gonzalez wanted Mr. Esparza to take him to get his car. His car was broke down and they talked and Mr. Esparza then drove him to his car.

Q. What happened thereafter? [531] A. Well they were gone for a couple of hours and they came back approximately 11:00 o'clock.

Q. And that was on May 29th? A. Right.

Q. Of 1975? A. Right.

MR. LAIFER: No further questions.

Excerpts from Testimony

CROSS-EXAMINATION
BY MS. AMON:

Q. You testified you worked for Mr. Esparza in 1971? A. Yes.

Q. And what did you do for Mr. Esparza? A. I worked like a grocery clerk, stock clerk, you know.

Q. How long did you work for him? A. Well he opened the store in 1971 and he sold the business I believe around 1972.

Q. Have you worked for Mr. Esparza since that time? A. No I have not.

Q. Do you see Mr. Esparza often? A. Yes.

Q. How often do you see Mr. Esparza? [532] A. Every day.

Q. How do you come to see Mr. Esparza every day? A. I see him in the social club.

Q. You are a member of the social club? A. Yes.

Q. Do you go to the social club every day? A. Yes.

Q. What do you do at the social club? A. Cards, pool, talk with the guys.

Q. This is every single day? A. Yes.

Q. When do you go to school? A. Like I said I am in the executive internship program. After 5:00 o'clock I am finished and I go home and go to the social club.

THE COURT: Are you the youngest member of the social club.

THE WITNESS: Well there are a few young guys who come around there.

THE COURT: How long have you been a member.

THE WITNESS: For about two years.

THE COURT: Since you are fifteen years of age.

THE WITNESS: About that.

Q. Now sir, you say you were in the social club on [533] May 29, 1975? A. Yes I was.

Q. Were you in the social club May 28, 1975? A. Yes.

Q. And were you in the social club May 30, 1975? A. Yes.

Q. Were you in the social club on May 31st, 1975? A. Yes.

Q. Every single day of your life you are in the social club? A. Right.

Q. Do you remember any conversations—Mr. Esparza was in the social club also, is that right? A. Yes he was in the social club.

Q. I am saying every day is Mr. Esparza in the social club every day? A. Yes he is.

Q. What is his relationship to that social club? A. He is the owner of the social club.

Q. He owns the social club? Have you ever seen Mr. Gonzalez in the social club before? A. Very few times. He was there once in a while.

Q. Is Mr. Gonzalez a member of the social club? A. Yes he was.

[534] Q. To your knowledge, Mr. Gonzalez or Mr. Esparza, are they friends to your knowledge? A. Yes they are.

Q. When before May 29, 1975 did you see Mr. Gonzalez and Mr. Esparza together in the social club? A. Mr. Gonzalez did not come to the social club too often, once in a while he would stop in.

THE COURT: What color car does Mr. Esparza have.

THE WITNESS: A blue convertible, he had a blue convertible.

THE COURT: What type.

THE WITNESS: Cadillac, 1967.

Q. On these other occasions that Mr. Gonzalez and Mr. Esparza were together in the social club and you

were there, do you recall the conversations? A. I cannot recall their exact conversations but they would talk, you know, like everyone, Mr. Esparza would talk to everyone who came into the club.

THE COURT: Would they talk in English or Spanish.

THE WITNESS: Mostly English when I was around.

THE COURT: Did Mr. Gonzalez talk in English [535] too.

THE WITNESS: Sometimes he would.

Q. You could understand Mr. Gonzalez when he spoke in English? A. He spoke broken English, he didn't speak—

Q. You could understand him? A. I could understand him, yes.

Q. No problem, is that right? A. No.

Q. On these other occasions apart from May 29 what were their conversations, the conversations between Mr. Gonzalez and Mr. Esparza? A. I cannot remember exactly every conversation they had, just friendly conversation, you know, Mr. Esparza would have conversations with everyone that comes into the club.

Q. You remember the conversation on May 29th? A. Yes.

Q. Now sir, have you ever or are you aware of any narcotic dealings or cocaine dealings or any other type of dealings that go on in the social club? A. No, I was not.

MR. LAIFER: Objection, there is no basis for the question.

[536] THE COURT: Overruled, I will allow it. A. No.

Q. Do you know anyone who deals in narcotics? A. No.

Q. And have you yourself ever had any relationship to narcotics? A. No.

Q. If you found out sir that someone was dealing in narcotics and you were aware of that information and you are a court officer working for a judge, what would you do with that information? A. I would inform the law.

Q. Were you at the Toligate bar on the night of May 29, 1975? A. No I was not.

MS. AMON: I have no further questions.

[537] REDIRECT EXAMINATION
BY MR. LAIFER:

Q. What are you studying to be? A. A lawyer.

MR. LAIFER: No further questions.

THE COURT: Are you in law school now?

THE WITNESS: No, I am in high school now.

THE COURT: You mean you hope to study to be a lawyer?

THE WITNESS: Right.

THE COURT: Mr. Asens, do you have any questions?

MR. ASENS: A few, your Honor.

CROSS-EXAMINATION
BY MR. ASENS:

Q. Mr. Wallace, you were present at some occasions where there were some conversations between Mr. Gonzalez and Mr. Esparza at the San Raphael Club? A. That is right.

Q. You have indicated that a portion of those conversations in what you term broken English, is that right? A. That is right.

Q. Were you present at any time when there were conversations in Spanish between the various individuals of [538] the San Raphael Club? A. Sometimes.

THE COURT: And Mr. Gonzalez.

Q. And Mr. Gonzalez; thank you, your Honor. A. Yes, I was.

Excerpts from Testimony

Q. When the conversation was in broken English was that primarily because you were present and that conversation included you? A. Usually when I was there they would try to speak English because I do not speak Spanish.

Q. When you say "try to speak English," was that to accommodate you? A. Yes, it was.

Q. When you were not perhaps part of the conversation, the conversation would then be in Spanish, is that right? A. Sometimes.

MR. ASENS: I have no further questions.

THE COURT: Anything further?

MR. LAIFER: One thing, your Honor.

REDIRECT EXAMINATION
BY MR. LAIFER:

Q. Mr. Wallace, how do you recall May 29th, 1975, specifically? [539] A. Specifically on the 28th I got my license. I had it stamped on May 28th and on the 29th I went to the Social Club to see Mr. Esparza. I wanted to borrow his car.

Q. Have you ever used that car? A. Yes, I have, many times. I learned to drive on it.

MR. LAIFER: Thank you.

THE COURT: Anything further?

MS. AMON: No, your Honor.

THE COURT: You may step down.

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS } ss
EASTERN DISTRICT OF NEW YORK

LYDIA FERNANDEZ being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 13th day of September 19 76 he served ~~a copy~~ two copies of the within

Brief and Appendix for the Appellee

by placing the same in a properly postpaid franked envelope addressed to:

Schulman & Laifer, Esqs., 16 Court St., Bklyn, NY 11201; Michael Young, Esq., The Legal Aid Society, Federal Defender Service Unit, 509 United States Courthouse, Foley Square, New York, N.Y. 10007; and Joseph L. Belvedere, Esq., 4518 11th Ave., Brooklyn, NY 11219

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, ~~Washington Street~~ 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Lydia Fernandez
LYDIA FERNANDEZ

Sworn to before me this

13th day of September 19 76

Martha Scharf
MARTHA SCHARF
Notary Public, State of New York

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